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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 882

W. F. AND JOHN BARNES COMPANY, JOHN S. BARNES CORPORATION, AND ODIN CORPORATION,

Petitioners,

vs.

INTERNATIONAL HARVESTER COMPANY AND EX-CELL-O CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

PAGE

Reply to respondents' brief in opposition to petition for writ of certiorari 1

Argument 1

Conclusion 13

List of Authorities.

Cases.

Arcambel v. Wiseman, 3 Dall. (3 U. S.) 306 11

Austral Sales Corporation, et al. v. Chamberlin Metal Weather Strip Company, 58 U. S. P. Q. 591 11

The Baltimore, 8 Wall. (75 U. S.) 377 12

B. B. Chemical Company v. Cataract Chemical Co., Inc., 2 F. R. D. 159, 51 U. S. P. Q. 323 11

Bone v. Walsh Constr. Co., 235 Fed. 901 11

Buchhalter v. Rude, 54 Fed. (2d) 834 4

Cincinnati Traction Bldg. Co. v. Westinghouse Air Brake Co., 27 F. Supp. 329 11

Cornelly v. Markwald, 24 Fed. 187 11

Criner v. Micro-Westco, Inc., 61 U. S. P. Q. 431, 3 F. R. D. 495 ..... 11, 12

Curtiss v. The Georgetown and Alexandria Turnpike Company, 6 Cranch. (10 U. S.) 233 2

Daube v. Philadelphia & Reading Coal & Iron Co., 77 Fed. 713 5

Dedekam v. Vose, 7 Fed. Case, 339 Cas. No. 3731 2

Erie Railway Company v. Tomkins, 304 U. S. 64 12

In re First Bond & Mortgage Co., 74 F. (2d) 930 11

Galion Iron Works & Mfg. Co. v. Beckwith Machinery Co., 25 F. Supp. 591 11

PAGE

Glade Jr. v. Walgreen Co., 46 F. Supp. 396..... 11

Gotz, et al. v. Universal Products Company, Inc., 3 F. R. D. 153, 58 U. S. P. Q. 510..... 11

Guardian Trust Co. v. Kansas City Southern Ry. Co., 28 F. (2d) 233..... 4

Hathaway v. Roach, 11 Fed. Cas. 818, Case No. 6213... 11

Henkel v. Chicago, etc., Ry., 284 U. S. 444.....7, 8, 12

Hussey v. Bradley, 12 Fed. Case 1059, Case No. 6946a. 5, 11

Kansas City Southern Rwy. Co. v. Guardian Trust Co., 281 U. S. 1.....4, 5, 8

Kelley v. Springfield, 83 Fed. 183..... 11

Kroger Grocery & Baking Co., et al. v. Martin, et al., 97 F. (2d) 348..... 11

Lambert v. Williams Lime Mfg. Co., 39 F. Supp. 18.... 11

Lykken v. International Pulverizing Corp., 55 U. S. P. Q. 443..... 11

Newton v. Consolidated Gas Co., 265 U. S. 78.....3, 10

Parker v. Bigler, 18 Fed. Cas. 1115, Case No. 10,726... 11

Ex Parte Peterson, 253 U. S. 300.....3, 4, 7, 8, 10, 11, 12

Raffold Process Corporation v. Castanea Paper Co., 25 F. Supp. 593..... 11

Rude v. Buchhalter, 286 U. S. 451..... 4, 8

Sioux County v. National Surety Co., 276 U. S. 238.... 12

Sneed v. Sabinal Mining & Milling Co., 73 F. 925..... 5

Sprague v. Ticonic, 307 U. S. 161..... 2

T. H. Symington & Son v. Symington Co., 12 F. Supp. 391 11

Tuck v. Olds, 29 Fed. 883..... 11

United States v. Harris, 77 F. 821..... 5

PAGE

The Vernon, 36 Fed. 113 11

Wesson v. Saline County, 73 F. 917 5

Wheaton, et al. v. Peters, et al., 8 Peters (33 U. S.) 591 12

Wooster v. Handy, 23 Fed. 49 11

STATUTES.

Act of August 23, 1842, Chapt. 188, 5 Stats. at L. 516... 12

Act of March 3, 1851, Chapt. 44 12

U. S. Code, Title 28, Sec. 597 8

U. S. Code, Title 28, Sec. 723 (b) 12

U. S. Code, Title 28, Sec. 723 (c) 12

U. S. Code, Title 28, Sec. 730 12

U. S. Code, Title 28, Sec. 731 12

U. S. Code, Title 28, Sec. 830, The Fee Bill Act..6, 7, 8, 9, 10

RULES.

Rules of Civil Procedure, Rule 52 (a) 5

Rules of Civil Procedure, Rule 54 (d) 1

MISCELLANEOUS.

10 Am. Jur. 951, Clerks of Court, Sec. 16 2

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INTERNATIONAL HARVESTER COMPANY AND EX-CELL-O CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondents' Argument in opposition to the writ of certiorari raises several interesting points which require a brief reply.

The respondents themselves have pointed to the Court at least one impelling reason for granting certiorari. At pages 13 to 14 the respondents have concluded their opposition brief with the observation that the question before the court involves "detail matters commonly handled in the clerk's office". **That is the very point which the petitioners have pressed throughout this entire cost litigation.** Whereas the allowance of costs is a judicial function and the court has discretion to allow, withhold or apportion legally taxable costs, the actual taxation is merely a ministerial function of the clerk. In fact, rule 54-d of the Rules of Civil Procedure provides: "Costs may be taxed **by the clerk**

on one day's notice". This Court only recently has held that "ordinary taxable costs" are "of a routine character", namely, the "fixed allowances for the various steps in a suit * * * known as costs 'between party and party' ".[1]

Since the parties are in agreement that the taxation of party and party costs is merely a routine duty of the clerk of court, it is obvious that there is no room for discretion. Instead the clerk must point to some statute or rule of court showing the items which may be taxed and the "fixed allowance" made taxable. The clerk of court is a mere ministerial officer directed, by law, to perform a ministerial act without any superintending agency.[2] His powers permit no exercise of judicial functions. Therefore there can be no discretion in mere taxation. The province of the clerk is limited to the ministerial service of comparing a proposed charge with the particulars set forth in the statute or rules of court as taxable. When the charge is not found to fall within the enumerated and designated fees, **it must be rejected.**[3]

The respondents' own observation that the taxation of costs is ministerial establishes the necessity for granting the petition. This court should make it clear to trial courts that the taxation of costs is purely a ministerial function of determining whether a given item and amount is rendered taxable by any statute or prior rule. The discretion which courts have on questions of costs is limited to discretion to allow, withhold, or apportion legally taxable items. The discretion must always be exercised within the framework of the law.

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1. *Sprague* v. *Ticonic* (1939) 307 U. S. 161, 168, 165.

2. *Custiss* v. *The Georgetown and Alexandria Turnpike Company* 6 Cranch. (10 U. S.) 233, 236; See also 10 Am. Jur. 951, Clerks of Court, Sec. 16.

3. *Dedekam* v. *Vose,* 7 Fed. Case. 339, 340, Case No. 3731.

At page 9 the respondents embark upon the specific point that there is no clean-cut issue of any general or public interest involved. This is perhaps novel but even a hurried consideration proves it to be utter nonsense. Costs are taxed against at least one of the parties in nearly all litigation; every citizen is vitally interested in costs. One of the first questions a client asks his attorney before litigating is "How much will it cost?" If it is too much, then the doors of the courts may be closed to an otherwise deserving and injured party. But at least, even if costs be high and be known beforehand, the litigant has an opportunity to evaluate the probability of success against the cost of justice and to govern his financial affairs accordingly. However, if the present decision shall stand and there shall be no guiding statute or rule, no litigant can be advised beforehand. The broad question is "Does the assumption of discretion on cost questions, uncontrolled by statute or rule, tend to close the courts to the public?" That it may, is obvious.

The importance of the present issues to the general public is illuminated by the respondents' facetious observation that the petitioners' questions "amount simply to the ridiculous inquiry: Are anything but legally taxable items legally taxable?" Ridiculous as it may seem, that, in fact, is the very question before the Court. If items are not rendered legally taxable by statute, rule or practice, does any court or clerk have authority to tax them?

With Circuit Courts of Appeals disagreeing as to the interpretation to be placed upon the *Peterson* and *Newton* cases (Petition, pages 28-30), an important and practical question of law, involved in every suit, is unsettled. Doubts should be resolved, whether the instant decree be affirmed, reversed or modified.

At page 12, the respondents find without merit the Petitioners' suggestion that the decision in *Ex parte Peterson* should be overruled. **The respondents have misstated the petitioners' position.** The petitioners' position was that the decision should be **either** limited or overruled. If limited as suggested by the petitioners, then the respondents are correct in their statement that the opinion "has stood without question in this court for well over two decades". But limited, that decision does not support the instant taxation. However, if not so limited, then the only construction of the opinion which supports the instant taxation has been overruled twice by this court.[4] The petitioners' brief demonstrates that the opinion has caused much confusion and uncertainty (Petition, pps. 28 to 31). Truly the case requires limitation or clarification; perhaps it should be overruled.

The foregoing general observations taken out of order are believed to show the necessity for certiorari. Petitioners now discuss the respondents' remaining points in their order of presentation in respondents' opposition brief.

At page 2, respondents fuss as to the length and complexity of the trial below. As we view it, this is interesting, but wholly immaterial, to the question before the court. The courts should be kept open freely to all suitors equally and no person should be placed in the position where he need have fear to file suit against a wealthy litigant because his cause of action be long and involved. If size be a controlling factor, a taxation of illegally assessable items of costs might be in the highest degree oppressive. That it is in this case is self-evident. General rules

4. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.* (C. C. A. 8 1928), 28 F. (2d) 233, 242, 243. Reversed 281 U. S. 1. *Buchhalter* v. *Rude* (C. C. A. 10, 1931), 54 Fed. (2d) 834, 838. Reversed 286 U. S. 451.

for the taxation of costs should be established[5] and they should be such that they will not be oppressive in any case, large or small. Further, they should be uniform.

At page 3, the respondents assert that it "is merely pointless" for the petitioners to observe that there were no findings to support the disputed items and amounts. **This assertion is unsound.** There can be no denial that the parties actively controverted the fact of whether the disputed items and amounts were identified as such under Acts of Congress, rules promulgated by its authority and practice established consistently with governing enactments.[6]

The trial court considered the motion to retax costs on the ground that "said items are unwarranted" and "are not allowable" (R. 177). In the trial of this issue of fact the respondents relied upon affidavits; the petitioners relied upon the record in the trial of the main case and upon the nature of the items for which taxation was sought. For petitioners there was no need for affidavits; the record was clear. An affidavit could add and prove nothing. There being an issue of fact, it behooved the respondents to see to it that every fact essential to the relief they sought was directly and unequivocably stated in the findings.[7]

No findings having been made by the Court, the only conclusion to be drawn is that the Court could not support its judgment by any findings of fact or conclusions of law. In effect, it found that no statute, rule, or practice per-

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5. *Hussey* v. *Bradley*, 12 Fed. Cas. 1059, Case No. 6946a.

6. *Kansas City Southern Rwy. Co.* v. *Guardian Trust Co.*, 281 U. S. 1, 9.

7. *Wesson* v. *Saline County* (C. C. A. 7th, 1896), 73 F. 917, 918; *Sneed* v. *Sabinal Mining & Milling Co.* (C. C. A. 7th, 1896) 73 F. 925, 926; *Daube* v. *Philadelphia & Reading Coal & Iron Co.* (C. C. A. 7th, 1897) 77 Fed. 713, 716; and *United States* v. *Harris* (C. C. A. 7th, 1897) 77 F. 821, 825. See also Rule 52 (a), Rules of Civil Procedure.

mitted taxation of the items disputed herein; it relied upon an assumed discretion. Hence, it is manifest that the petitioners' observation with respect to findings is **not** "merely pointless."

At page 5, the respondents place considerable reliance upon the observation of the Circuit Court (R. 200; 145 F. (2d) at p. 917) that The Fee Bill Act, especially U. S. Code, Title 28 Sec. 830 "applied only to the costs therein specifically referred to". **This observation by the Circuit Court of Appeals is contrary to the law.** If Congress so intended, it would be quite unnecessary to provide so gravely that "the following and no other compensation shall be taxed and allowed"; that certain specifically enumerated items "shall be taxed * * * and be included in * * * a judgment or decree"; and that "all laws and regulations heretofore made * * * are hereby repealed and abrogated".

Indeed, if Congress had intended The Fee Bill to cover only a small portion of the field of cost taxation, it would be wholly unnecessary for it to trammel the Act with these conditions. This statute certainly cannot be construed as being limited in scope. There is not a single word in the entire statute which grants to any trial court discretion to tax items or amounts not enumerated therein, nor is there any implication that the trial court has such power.

When Congress repealed all incompatible prior laws and regulations and provided that certain named items "shall * * * be included," it used the word *included* as one of limitation or enumeration, not as a word of extension or enlargement. When the word *included* is used as a participial adjective, it is a word of confinement. Any doubt is resolved quickly and correctly by the maxim *expressio unius est exclusio alterus* and by the intention of Congress as explained on the floor by those in charge of The Fee Bill.

There can be one answer only to the respondents' continued efforts to gloss over the failure of the trial court to make supporting findings of fact and conclusions of law and for the opinion of the Circuit Court of Appeals that there is no necessity for statutes and rules or practice supported thereby. That answer is that **there is no authority for the disputed taxation.** This entire taxation is supported by an assumed discretion.

At page 6, the respondents refer to that portion of the opinion which recites that a trial court in equity has a large discretion to admit evidence. That is true, but immaterial. The argument as to admissability of evidence has no force when applied to the question of cost taxation. With respect to the taxation as costs of items of evidence, Congress has denied that the trial courts have any discretion. Congress says that "**lawful fees** for exemptions and copies of papers necessarily obtained for use on trials"[8] may be taxed. Through the years, Congress provided lawful fees for a multitude of items which might be introduced in evidence, but consistently failed to provide lawful fees for the items herein disputed. There is no statute, rule, or practice which establishes a lawful fee for the items herein taxed.

Congress having prescribed the amount to be allowed for procuring documents as "lawful fees", its enactment controls over any constructive arguments based upon the *Peterson* case.[9] Nor is there any statute, rule or practice granting to any trial court the discretionary power to tax expenses in lieu of lawful fees. If there is such discretionary power in a trial court, **the respondents should point out its source.**

8. U. S. Code, Title 28, Section 830.
9. *Henkel* v. *Chicago, etc. Ry.*, 284 U. S. 444, 446.

At pages 6 and 7, the respondents have inferred that both *Kansas City Southern Railway Co.* v. *Guardian Trust Co.*, 281 U. S. 1, and *Rude* v. *Buchhalter*, 286 U. S. 451, are cases dealing **only** with attorneys' fees, an item specifically covered by statute. The respondents failed to show that both cases also denied expenses of litigation which were items not specifically covered by any statute. Each case covers "counsel fees **or other expenses.**"

Respondents' theory is that if the statute establishes a fee, the courts are bound thereby, but that if no statute establishes a fee, then the courts have a discretion. Their lack of candor with respect to this theory is evidenced by their next paragraph discussing deposition expenses (a relatively small item here, but still the sizeable amount of $2,349.49, R. 160-161). As to this item, the statutes grant a stated fee to the officer taking and certifying the deposition but the court went beyond that statutory fee. This Court distinguishes the *Peterson* case under these circumstances and held "* * * when the Congress has prescribed the amount to be allowed as costs, its enactment controls."[10]

At page 10 the respondents assert that the Court of Appeals did not permit "a District Court to tax as costs, items not made taxable as such by statute, rule or practice." **This statement is wrong.** The Circuit Court of Appeals abandoned U. S. Code, Title 28, §830, the cost granting section of The Fee Bill Act, and, even upon the incidental question[11] of deposition costs refused to be controlled by U. S. Code, Title 28, §597. With respect to rules or prac-

10. *Henkel* v. *Chicago, etc. Ry.* 284 U. S. 444, 446.

11. Even though the greatest volume of respondents' answer is devoted to deposition fees, they play but an incidental part in this entire litigation. Deposition expenses taxed total $2,349.99. Other items total $28,209.42.

tice no one has pointed to any rule of court or established practice that defines the instant items as taxable costs.

The respondents continue on page 10 and assert that the Circuit Court of Appeals did not reach "the conclusion that a federal court of equity sitting in Illinois has the discretion to define what expenditures of litigation are taxable as costs to either party." **This assertion is also false.** The opinion of the Circuit Court specifically holds (R. 201) "the District Court is entrusted with discretionary power * * * to tax as party and party costs the reasonable expenses of * * * procurement (of such items of evidence as numbers 1, 2, 3, 4 and 5 of the Court's opinion) if the court reasonably thought they were necessary and helpful to an expeditious and proper trial of the issues." Further, the opinion is liberally interspersed with numerous observations that a trial court has discretion in these matters. The premise upon which Petitioner's question 3 is based (Petition, page 8) is merely a paraphrase of the entire opinion.

On the same page the Respondents next state that the Circuit Court of Appeals did not purport "to construe The Fee Bill Act of 1853 without considering legislative intent". **Again the Respondents have misstated the facts.** That the Circuit Court of Appeals construed The Fee Bill Act is self-evident (R. 200). That it did not consider the legislative intent is also self-evident. The Circuit Court of Appeals held that the Act "applied only to the costs therein specifically referred to." It could not have reached this holding if it had considered the intent of Congress; Congress intended that "no other compensation shall be taxed and allowed" (Petition p. 6); that certain specifically named items "shall be taxed * * * and be included in * * * a judgment or decree" (Petition p. 7); that "all laws and regulations heretofore made * * * are hereby repealed and

abrogated'' (Petition, p. 7); that the bill prescribes ''item fees for every item that should be taxed'' (Petition p. 7); that the act is designed ''to prescribe the costs'' (Petition p. 8); and that the bill prescribes ''a limited number of definite items to be allowed.'' (Petition p. 8). The holding of the Circuit Court of Appeals is wholly incompatible with the intention of Congress as expressed both in The Fee Bill Act itself and upon the floor of Congress.

Next, page 11, the respondents find fault that petitioners rely upon the *Peterson* and *Newton* cases to show the taxation to be illegal. Respondents assert that petitioners' argument ''hangs by the tenuous thread of their own peculiar interpretation of those cases.'' Oddly enough, the ''peculiar'' interpretation is identical with that placed upon those two cases by the Supreme Court itself. The approved interpretation does not justify the instant taxation (Petition, pps. 30 and 31, footnotes 20 and 24). The ''sound'' interpretation of respondents, as placed upon those two cases by the respondents and by the Circuit Court of Appeals in the instant case, is identical with that twice reversed by the Supreme Court (Petition pps. 30, 31, footnotes 22 and 23).

At pages 11 and 12, the respondents cite several cases to argue that the instant decision is in accord with applicable practice. We do not analyze the cases here because they are contrary to the established practice. There is no question that the long established practice, starting prior to The Fee Bill Act and continuing consistently to 1944,

forbids taxation of the items herein disputed.[12] Moreover, each of the cases cited by respondents is distinguishable—each represents an exception not present here, such as state law, absolute (not reasonable) necessity, and the like. Further, many of them disallow taxation of the items disputed herein. If the practice be changed, it should be changed by rule of court or statute prospectively applied rather than by an innovation in behalf of a particular litigant.[13] *Ex post facto* law is as contrary to public policy in cost taxation as it is in all other law.

The interesting observation is that all of the cited cases are subsequent to the *Peterson* case. Prior to that case, no federal court allowed such items as costs. Even after that case, the majority disallow them. The decisions are not "equally unanimous" (Opposition brief, p. 12); in-

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12. *Hathaway* v. *Roach* (C. C. Mass. 1846), 11 Fed. Cas. 818, Case No. 6213; *Parker* v. *Bigler* (C. C. Pa. 1857), 18 Fed. Cas. 1115, Case No. 10,726; *Hussey* v. *Bradley* (C. C. N. Y. 1864), 12 Fed Cas. 1059, Case No. 6946a; *Wooster* v. *Handy* (C. C. N. Y. 1885), 23 Fed. 49; *Cornelly* v. *Markwald* (C. C. N. Y. 1885), 24 Fed. 187; *Tuck* v. *Olds* (C. C. Mich. 1886), 29 Fed. 883; *The Vernon* (D. C. Mich. 1888), 36 Fed. 113; *Kelley* v. *Springfield* (C. C. Ohio 1897), 83 Fed. 183; *Bone* v. *Walsh Constr. Co.* (D. C. Iowa 1916), 235 Fed. 901; *In re First Bond & Mortgage Co.* (C. C. A. 5, 1935), 74 F. (2d) 930; *T. H. Symington & Son* v. *Symington Co.* (D. C. Md. 1935), 12 F. Supp. 391; *Galion Iron Works & Mfg. Co.* v. *Beckwith Machinery Co.* (D. C. Pa. 1938), 25 F. Supp. 591. *Raffold Process Corporation* v. *Castanea Paper Co.* (D. C. Pa. 1938), 25 F. Supp. 593; *Cincinnati Traction Bldg. Co.* v. *Westinghouse Air Brake Co.* (D. C. Pa. 1939), 27 F. Supp. 329; *B. B. Chemical Company* v. *Cataract Chemical Co., Inc.* (D. C. N. Y. 1941), 2 F. R. D. 159, 51 U. S. P. Q. 323; *Lambert* v. *Williams Lime Mfg. Co.* (D. C. Tenn. 1941) 39 F. Supp. 18; *Glade, Jr.* v. *Walgreen Co.* (D. C. Ill. 1942), 46 F. Supp. 396; *Lykken* v. *International Pulverizing Corp.* (D. C. N. J. 1942), 55 U. S. P. Q. 443; *Austral Sales Corporation et al.* v. *Chamberlin Metal Weather Strip Company* (D. C. N. Y. 1943), 58 U. S. P. Q. 591; *Gotz et al.* v. *Universal Products Company, Inc.* (D. C. Del. 1943), 3 F. R. D. 153, 58 U. S. P. Q. 510; and *Criner* v. *Micro-Westco, Inc.* (D. C. Iowa 1944), 61 U. S. P. Q. 431, 3 F. R. D. 495.

13. *Kroger Grocery & Baking Co. et al.* v. *Martin et al.* (C. C. A. 6, 1938) 97 F. (2d) 348, 349; *Arcambel* v. *Wiseman*, 3 Dall. (3 U. S.) 306.

stead, the indefinite dictum in the *Peterson* case has caused a **"hopeless confusion"** (*Criner* v. *Micro-Westco, Inc.*, 3 F. R. D. 495, 497), which should be resolved through the grant of certiorari.

Further, even if respondents' interpretation of the cited cases were correct, none is authority for the instant taxation. These cases, at most, evidence the practice in the 2nd and 9th Circuits and in scattered District Courts in Mass., Md., Tenn., Mich., Pa., and Delaware. No one can honestly state that any of those courts has authority to establish or even to evidence a rule of practice or a rule of court within this district. True the Supreme Court has that authority;[14] the Circuit Court of Appeals may have it; and so does the District Court itself.[15] But no other court has that authority or power.

The cited cases cannot be authority for any nationwide practice, for there is no general common law of the United States.[16] No principle pervades the union and has the authority of federal law unless it is embodied in the Constitution or laws of the union. Hence, in the absence of controlling federal statute, one must look to the state law,[17] even on cost questions.[18]

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14. U. S. Code, Title 28, Sections 723(b), and 723(c) and 730. Perhaps, the Act of August 23, 1842, Chapt. 188, 5 Stats. at L. 516 is also applicable.

15. U. S. Code, Title 28, Section 731. See also Act of March 3, 1851, Chapt. 44, which grants to the District Court of Illinois power to establish **rules and regulations** of the fees and costs to be taxed therein. The act grants no discretion.

16. *Wheaton, et al.* v. *Peters, et al.* (1834. Suit in Equity) 8 Peters (33 U. S.) 591, 658; *Erie Railway Company* v. *Tomkins* (1938. Action at Law) 304 U. S. 64, 78.

17. *Erie Railway Co.* v. *Tomkins* (1938) 304 U. S. 64, 78.

18. *Ex parte Peterson* (1920) 253 U. S. 300; *Sioux County* v. *National Surety Co.* (1928) 276 U. S. 238, 241; *Henkel* v. *Chicago etc. Ry.* (1932) 284 U. S. 444, 446; *The Baltimore* (1869), 8 Wall. (75 U. S.) 377, 390-391.

Therefore, even if the cases cited by the respondents were in accord with practice in other federal jurisdictions (which they are not) they afford no weight to an answer of a question arising from a District Court sitting in Illinois.

CONCLUSION.

In conclusion the petitioners respectfully submit that the instant case is one involving a question of great and impelling public interest. This Court should exercise its discretion to grant certiorari to eliminate the present confusion in the law relating to the taxation of costs in the Federal Courts.

Respectfully submitted,

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